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IN THE

# Supreme Court of the United States

MATTHEW J. RYAN; ROBERT C. JUBELIRER;
JESS M. STAIRS and JAMES J. RHOADES,

*Petitioners,*

*v.*

DAVID POWELL, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## REPLY BRIEF

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## INTRODUCTION

Respondents' efforts to undermine the importance of review by this Court of the orders rejecting Petitioners' assertion of legislative immunity highlight the federalism concerns inherent in this case. This reply brief is filed, pursuant to Supreme Court Rule 15.6, to address the issues newly raised by Respondents.

## REASONS FOR GRANTING THE PETITION

### I. THE PETITION RAISES MATTERS OF NATIONAL IMPORTANCE

#### A. The Questionable Rationale of *Gillock*

Respondents acknowledge that federal legislators are protected against discovery by the Speech or Debate Clause, U.S. CONST. art. I, § 6. *See* Brief in Opposition at 14; *see also* Petition at 15-16 (citing cases). The privilege extends to state legislators, *not* because they are directly protected by U.S. CONST. art. I, § 6, but because federal common law has made the state legislative privilege coextensive in federal civil matters with that enjoyed by federal legislators under the Speech or Debate Clause. Petition at 13 (citing *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 733 (1980)). The immunity, in both its constitutional and common law forms, operates as a bulwark of separation of powers and legislative independence. Petition at 14-15; *see also Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) ("[r]egardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference").

Respondents, however, contend that this Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980), dilutes the protection of common law immunity where a state legislator is sued under federal law. They argue this dilution is appropriate because there is a lack of separation-of-powers concerns between the state and federal systems. *See* Brief in Opposition at 15 (citing *Gillock*, 445 U.S. at 370). Respondents' reliance on *Gillock* places in sharp relief the critical issues of federalism implicated here.

As this Court explained in *Printz v. United States*, the Constitution preserves the States as independent political entities:

> The great innovation of this [constitutional] design was that 'our citizens would have two political capacities, one state and one federal, each protected from incursion by the other' — 'a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations of the people who sustain it and are governed by it.' The Constitution thus contemplates that a state's government will represent and remain accountable to it own citizens.
>
> * * * *
>
> This separation of the two spheres is one of the Constitution's structural protections of liberty. 'Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive

> power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'

521 U.S. 898, 920, 921 (1997) (internal citations omitted).

This Court has never applied the rationale from *Gillock*, which arose in a criminal matter, to a civil case. *See* Petition at 13 n.9. Such an application would be in conflict with the decisions of the Court, including *Printz*, which respect the independence of state legislatures and their role in the federalist system. *See e.g., New York v. United States*, 505 U.S. 144 (1992) (Congress cannot commandeer the legislative processes of the States); *Alden v. Maine*, 527 U.S. 706, 749-759 (1999) ("In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege [of immunity from suit]").

The continued validity of *Gillock* is questionable, given the importance of the separation of powers between the federal government and the States' governments which this Court has stressed in its decisions over the past decade. *See e.g., United States v. Morrison*, 529 U.S. 598, 615 (2000) (emphasizing the "Constitution's distinction between national and local authority"); *Alden*, 527 U.S. 706; *Printz*, 521 U.S. 898; *New York*, 505 U.S. 144. *See also Gillock*, 445 U.S. at 374 (Renquist, J. and Powell, J., dissenting) (adopting, as the reason for dissent, the reasons given by the Sixth Circuit in favor of applying the privilege which included a frank acknowledgement of power struggles between the federal government and the states).

Concern for legislative independence in the states assumes heightened importance in the context of education, a governmental function traditionally within the province of the state, *see e.g., San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), and one that is frequently on the minds and lips of citizens. Legislative immunity, which serves to protect the public and the legislative process, *see Tenney v. Brandhove*, 341 U.S. 376, 377 (1951), enables constituents to bring their thoughts, complaints and concerns about education (and the budgets which support it) directly to their elected representatives. Legislators must be assured a sphere within which to assess and mold those concerns into legislative proposals. Access by private litigants, through discovery, to a legislator and the legislator's files, aside from providing insight into the legislative process held by no other, will serve to chill the public's willingness to participate in that policy debate. Federalism is built, in large part, upon an understanding that state government is accountable to the people.[1] *See Printz*, 521 U.S. at 920 ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens").

It is the nature of legislative work that makes the underlying order particularly disruptive. The legislative process involves countless individuals in addition to legislators. *Campaign for Fiscal Equity, Inc. v. State of New York*, in which private litigants sought information from an expert witness aiding state representatives on a computer model for state educational funding, provides a concrete

1. Acceptance of federal funding for education cannot act as a waiver or somehow dilute the protection of legislative immunity. No court has ever recognized a requirement that a state and its officials forfeit the common law legislative privilege in return for federal funding.

example of how litigants may attempt to gain indirect access. 179 Misc.2d 907, 687 N.Y.S.2d 227, *aff'd*, 265 A.D.2d 277, 697 N.Y.S.2d 40 (App. Div. 1999).

The discovery issue presented here is not tied, moreover, to education and this case. It could resurface in any context in which a private litigant considers himself aggrieved by legislative choices. The Court must not countenance the disruption to the legislative process that would ensue if private litigants are permitted to conduct discovery in areas involving core legislative functions.

**B. Preservation of Federalism**

In an attempt to downplay the significance of the underlying order to the separation of powers between federal and state government, Respondents characterize it as a run-of-the-mill discovery order. The federal courts, with the exception of the Third Circuit, do follow a general rule that routine discovery orders are not appealable under 28 U.S.C. § 1291 or the collateral order doctrine. *See e.g., Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992).[2] That rule, however, does not operate here.

In this case the procedural posture of the underlying order does not determine its appealability. Rather, it is the *substance*

2. The Third Circuit, which permits review for certain categories of discovery orders, including those involving "traditionally recognized privileges," is recognized to deviate from this general rule. *See In re Ford Motor Company*, 110 F.3d 954 (3d Cir. 1997); *see also* Petition at 19 n.11; Brief in Opposition at 6, 9. The point, however, is that all of the appellate courts and this Court characterize orders denying immunity as collateral orders, raising issues too important to be denied immediate review. *See* Petition at 19-20.

of the underlying order that is decisive. An order denying legislative immunity belongs to that "small class" of collateral orders for which the "rights asserted [are] too important to be denied." *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).[3] While this Court has consistently warned against over-use of collateral order jurisdiction, it has never done so in the context of legislative immunity.

Respondents contend that courts routinely refuse to exercise collateral order jurisdiction over discovery orders, even those that deny privileges. Yet, they cite only cases involving non-governmental privileges or governmental privileges that are less than absolute. *See* Brief in Opposition at 9. These privileges, while serving important societal interests, do not share the significance of the federal common law legislative privilege.[4] That privilege, like its

3. Respondents make too much of Petitioners' citation of cases involving legislative immunity from suit, as opposed to immunity from discovery. Petitioners are well aware of the holdings of these cases. They are cited because immunity from discovery is derived from the same core of immunity that provides immunity from suit. *See* Petition at 15-16.

4. Petitioners' initial refusal to respond to discovery, which Respondents for some reason point out, was not based solely on legislative privilege. Objections to relevancy (including the time-frame from within which information was sought) and public availability were also made. App. at 78a-95a; 97a-136a. An order compelling discovery over objections of relevancy and availability would have been interlocutory in nature. It is the significance of the legislative privilege to our dual system of governance that differentiates it from other discovery objections. It is the critical role the legislative privilege plays in maintaining separation of powers between the state and federal governments and in preventing disruption and interference with core legislative duties that compels Petitioners' assertion of the privilege here.

constitutional counterpart, protects the legislative process by ensuring that the exercise of legislative discretion is not inhibited by the judiciary or by private litigants "on the conclusion of the pleader." *Tenney*, 341 U.S. at 377.

### C. Waiver Is Before The Court

While the Third Circuit did not, as Respondents point out, *expressly* base its refusal to assume collateral order jurisdiction on a theory that Petitioners had waived their right to raise the legislative privilege, *see* Brief in Opposition at 18, the concept of waiver pervades the entire decision. Both the panel majority and the concurring judge refused to acknowledge that a recognizable legislative privilege even existed for intervening legislators. *See* App. at 8a-9a; *see also* 18a-22a. The issue of waiver, intimately intertwined as it is with the Third Circuit's understanding of the privilege, is before this Court.

## CONCLUSION

For the reasons developed above and in the Petition, the Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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